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# DISCUSSION PAPER ON APOLOGY LEGISLATION

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# 1. Introduction

The Ministry of Attorney General has an on-going mandate to review and implement reforms that improve the responsiveness of the justice system. As part of this mandate, the ministry is committed to developing strategies that promote the early, effective and affordable resolution of legal disputes. Examples of the types of strategies implemented to date include the Notice to Mediate in Supreme Court and the Court Mediation Project in Provincial Court.[1]

One new strategy to promote the early, effective and affordable resolution of disputes that is being considered by the Ministry of Attorney General is apology legislation; that is, legislation that would prevent liability being based on an apology, by making the apology inadmissible for purposes of proving liability and by not construing the apology as an admission of liability. The purpose of this discussion paper is to stimulate discussion about this proposal and to solicit comments.

# 2. Background

Society places a great value on apologies as a way of redressing wrongs. When we act in a way that results in harm to another, an apology is seen to be an appropriate ethical response. It is also recognized that an apology can have a therapeutic impact on the person injured, facilitating the healing process and the process of reconciliation and closure.[2]

Anecdotal evidence from those involved in dispute resolution and litigation is clear that an apology can go a long way toward resolving a dispute.[3] In fact, mediators report that, for many plaintiffs, a sincere apology is the most valuable part of a settlement. If given at an early stage, an apology can promote the early

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[1] The Ministry is also supporting the work of the Civil Justice Reform Working Group of the BC Justice Review Task Force. On September 21, 2004, it released a Green Paper entitled "The Foundations of Civil Justice Reform" addressing the issues of access to the civil justice system. This paper is intended to provide discussion about fundamental issues relating to cost, delay and complexity that threaten the effectiveness of the system.

[2] Cohen, Jonathan R., "Legislating Apology: The Pros and Cons", (2002) 70 University of Cincinnati Law Review 819 at 872; Cohen, Jonathan R., "Advising Clients to Apologize", (1999) 72 Southern California Law Review, 1009; Shuman, Daniel W., "The Role of Apology in Tort Law", (2000) 83 Judicature 180,; Alter, Susan, "Apologizing for Serious Wrongdoing: Social, Psychological and Legal Consideration", Law Commission of Canada, 1999.

[3] See, for example, Peterson, Jan Eric, "Why Not Say "I'm Sorry", Washington State Bar News, May 2001 [Mr. Peterson's comments were noted with approval in *The Advocate*, vol. 59, July 2001, pp.652-53].

resolution of a dispute and result in significant savings. It may also influence the quantum of settlement. [4]

Empirical evidence is now emerging in the United States in the area of medical malpractice litigation that supports the view that apologies can reduce litigation and promote the early resolution of disputes.

- In 1994, a study was conducted of a group of patients and their families who had filed medical malpractice suits. The results indicated that 37% of those interviewed might not have commenced litigation if they had been given a complete explanation and apology. Interestingly, they reported that an explanation and apology were more important than monetary compensation.[5]
- In 1987, after losing two medical malpractice cases that cost a total of $1.5 million US, the Veterans Affairs Medical Center in Lexington, Kentucky, a 400 bed hospital, changed its approach to medical mistakes. It adopted a policy of full disclosure and apology. The approach is credited with reducing lawsuits, settlement costs and defence costs. Seventeen years later, only three cases have gone to trial and the average settlement is $16,000, as compared to the national average for veterans' affairs facilities of $98,000. In addition, cases closed in two to four months, significantly below the average of two to four years.[6]
- Since 2002, the hospitals in the University of Michigan's Health System have been encouraging doctors to apologize for mistakes. Malpractice lawsuits and notices of intent to sue have fallen from 262 filed in 2001 to about 130 a year.[7]

Yet, notwithstanding the recognized value of apologies, both morally and as an effective tool in dispute resolution, apologies are not fully embraced within our legal culture. A recent review of apologies in Canadian law indicates the legal consequences of an apology are far from clear. However, lawyers continue to be legitimately concerned that an apology could be construed as an admission of

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[4] Shuman, op. cit. pp. 180-183.

[5] Van Dusen, Virgil and Spies, Alan, "Professional Apology: Dilemma or Opportunity", American Journal of Pharmaceutical Education 2003; 67 (4) Article 114, p. 3.

[6] "Why Sorry Works!" Works: Overview of the Sorry Works Program for the Medical Malpractice Crisis, www.victims&families.com/sorry.phtml; Morris, Catherine, "Legal Consequences of Apologies in Canada", Draft Working Paper presented at a workshop on "Apologies, Non-Apologies and Conflict Resolution", October 3, 2002, www.peacemakers.ca/publication; Van Dusen and Spies, op. cit., at p. 2.

[7] Associated Press, "Doctors urged to apologize for mistakes; Softer approach aims to reduce malpractice lawsuits", November 11, 2004.

liability. An apology could also have adverse consequences for insurance coverage. As a result, lawyers generally advise their clients to avoid apologizing.[8]

## 3. A legislative response

Some American states and all Australian states[9] have responded to this situation by enacting legislation that prevents liability being based on an apology. This legislation generally takes one of two forms. The first, and more cautious, provides that an expression of sympathy or regret is not admissible as evidence in litigation. However, protection is not accorded to an apology that includes an admission of liability or fault. Massachusetts, California, Texas and Florida[10] have enacted this type of so-called "safe harbour" legislation.[11] This model has also been followed in several Australian states, including Victoria and Queensland.[12]

Colorado and Oregon have gone farther – and have adopted legislation that protects apologies that contain admissions of fault or liability. However, the legislation in these two states only applies to cases involving medical care.[13]

The Australian state of New South Wales has the most comprehensive apology legislation. It extends to apologies that include an admission of fault, providing that an apology does not constitute an admission of fault or liability and cannot

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[8] Morris, op. cit., pp. 1-5. In brief, she concludes that apologies may not be as "dangerous" as popularly believed. Nonetheless, lawyers have legitimate reasons for advising their clients not to apologize. As she says, at p. 5:

> …lawyers will not be persuaded by anecdotal or statistical evidence that sincere apologies may facilitate earlier and lower settlements against defendants. Lawyers are interested in protecting the interests of their *particular* client who is not a statistic or someone else's happy-ending story.

[9] (2004) 1 Australian Civil Liability, p. 7. Note: Apology legislation in Australia has been enacted as part of a broad reform to the law of negligence. The reform responded to concerns about the price and availability of insurance throughout Australia and is based on the report of the Panel for the Review of the Law of Negligence, chaired by Justice Ipp. Interestingly, apology legislation was not addressed in the Panel's report, but it has been adopted in one form or another by all jurisdictions in the country.

[10] Mass. Gen. Laws Ann., c. 233 #23D (1987); Cal. Evid. Code, #1160 (2000); Tex. Civ. Prac. & Rem. Code Ann. #18.061 (2001); Fla. Stat. #90.4026 (1999).

[11] The wording of California's legislation is typical of this type of legislation. It provides:

> The portion of statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of or in addition to, any of the above, shall not be inadmissible pursuant to this section.

[12] *Wrongs Act 2002*, Victoria consolidated Statutes; *Civil Liabilities Act 2003*, c. 16, Queensland Statutes 2003.

[13] Col. Rev. Statutes, Art. 25, Title 13, HB 1232 (April 17, 2003); Oregon Laws 2003, c. 384, HB 3361 (June 16, 2003).

be introduced as evidence of fault or liability in civil proceedings.[14] The provision is included in the *Civil Liability Act 2002*, which implemented wide-ranging reform to the law of negligence.[15]

To date, no jurisdiction in Canada has enacted apology legislation.

## 4. Factors in favour and against apology legislation

A review of recent academic literature suggests that factors in favour of apology legislation include:

a. To avoid litigation and encourage the early and cost-effective resolution of disputes;
b. To encourage natural, open and direct dialogue between people after injuries; and
c. To encourage people to engage in the moral and humane act of apologizing after they have injured another and to take responsibility for their actions.

Negative factors include:

a. Public confidence in the courts could be adversely affected if a person who has admitted liability in an apology is found not liable;
b. Insincere and strategic apologies could be encouraged; and
c. Apologies encouraged by such legislation might create an emotional vulnerability in some plaintiffs who may accept settlements that are inappropriately low.[16]

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[14] Sections 68 and 69 of the *Civil Liability Act 2002* provide:

68. In this Part:
Apology means an expression of sympathy or regret, or a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.

69. (1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person:
(a) does not constitute an express or implied admission of fault or liability by the person in connection with the matters, and
(b) is not relevant to the determination of fault or liability in connection with the matter.
(2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with the matter.

[15] See footnote 9. In speaking on Second Reading of the bill, the Premier of NSW said:
An apology by or on behalf of the defendant will also not constitute an admission of liability and will not be relevant to the determination of fault or liability in connection with civil liability. Injured people often simply want an explanation and an apology for what happened to them. If these are not available, a conflict can ensue. This is, therefore, an important change that is likely to see far fewer cases ending up in court. (NSW Mansard, October 23, 2002, p. 5764)

[16] Cohen, "Legislating Apologies: The Pros and Cons", op. cit., at pp. 841, 866 and 871-72 and Morris, op. cit., at p. 9 – 10.

## 5. Scope of apology legislation

As has been discussed above, there are two types of apology legislation – legislation that stops short of protecting apologies that include admissions of liability and legislation that extends to the latter. To date, the more limited legislation has been adopted by more jurisdictions – undoubtedly because it is less controversial. However, the following concerns have been raised about this type of legislation:

- It is not particularly effective in changing the *status quo:* i.e., it is most unlikely that expressions of condolence would now be construed as admissions of fault;
- It does not encourage true apologies – and may encourage insincerity for strategic purposes.[17]

## 6. Application to intentional acts

Another issue in considering apology legislation is whether it should extend to intentional acts. As discussed above, the New South Wales legislation is part of a broad statutory scheme designed to reform the law of negligence. As such, the legislation does not apply to "intentional acts done with intent to cause injury or death."[18]

The public policy reasons for and against adopting apology legislation outlined above in section 4 would seem to apply whether or not intentional acts are included within the scope of the legislation. However, there is a slight difference in emphasis with respect to the pros and cons. That is:

- The moral and psychological need for an apology after an intentional act probably is greater than after a negligent act; and
- The potential for adversely affecting public confidence and for "injustice" to be done to the injured party is greater if an apology for an intentional act is inadmissible in civil proceedings.[19]

Apology legislation that extended to intentional acts, could give rise to litigation over whether or not an act was intentional, thus undermining a primary purpose of the legislation.

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[17] Ibid.
[18] *Civil Liability Act 2002*, New South Wales, s. 3B.
[19] Cohen, "Legislative Apologies: The Pros and Cons", op. cit. at p. 867.

## 7. Insurance issue

In New South Wales, particular attention was paid to the impact of apologies on insurance contracts. The Law Council of Australia noted that insurance contracts commonly include a clause that voids the contract if an admission of liability is made. Therefore, legislation that only dealt with the admissibility of an apology in court proceedings would not be sufficient to reduce litigation through the encouragement of apologies. As a result, the legislation is worded to ensure that an apology cannot be taken to be an expression of liability for the purpose of voiding an insurance contract.[20]

## 8. Conclusion

Evidence and experience suggests that many disputes could be resolved earlier, more effectively and less expensively if apologies were promoted within our legal system. Taking into account the research outlined above, British Columbia proposes to adopt the broader form of apology legislation. This could be accomplished by enacting legislation preventing liability arising out of an apology, by making the apology inadmissible for the purpose of proving liability and by providing that an apology does not constitute an admission of liability.

The Ministry of Attorney General seeks your comments on the concept of apology legislation and its potential impact. Please direct your written comments by February 24, 2006 to:

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[20] *Civil Liability Act 2002* ,NSW, ss. 68 & 69. See also the submission of the Law Council of Australia to the Negligence Review Panel of the Review of the Law of Negligence, August 2, 2002, Cohen, "Advising Clients to Apologize", op. cit., pp. 1025-28, and Morris, op. cit., p. 5.